IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.826 OF 2006

IN

ARBITRATION PETITION NO.156 OF 2005

AND

ARBITRATION PETITION NO.156 OF 2005

...

Noy Vallesina Engineering SpA)
A Corporation organized and)
existing under the Laws of Italy)
having its registered office at)
Via Sant' Aberto, 1-24020,)
Parre (BG), Italy.)...Petitioner.

v/s.

Jindal Drugs Limited, a Company)

incorporated under the Companies)
Act,1956 having its Registered)
Office at 145, Maker Chambers VI)
220, Nariman Point,Mumbai 400021)...Respondent.

...

Mr.F.D'vitre with Mr.Gaura Joshi, Mr.Devesh Juwekar, Mr.Vigul Gabriel i/b Anil Agarwal for the Petitioner.

Dr.V.V.Tulzapurkar with Mr.Anand Desai, Mr.Sajit Suvarna and Mr.Munaf Virjee i/b D.S.K.Legal for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 5th June, 2006

JUDGMENT:

1. This petition has been filed seeking enforcement of Foreign Award dated 1.2.2000 and 22.10.2001, under Section 47 read with Section 48 of the Arbitration and Conciliation Act,1996 hereinafter referred to as

"the Act". The facts that are material and relevant for deciding this petition are as under:-

. The petitioner is a Company incorporated under the Laws of Italy. It is involved in the business of setting-up and construction of plants for production of Synthetic fibers, Polymers and ascorbic acid. The respondent is a Public Limited Company incorporated under the Companies Act. The respondent in the year 1994 entered into negotiations with a Company called "Enco Engineering Chur AG of Sagenstrasse 97, 7001 Chur, Switzerland. On 30.1.1995 the respondent entered into four related agreements with Enco for setting up ascorbic acid Acid plant in India. The four agreements are as under:-

(i) Engineering Contract for Ascorbic Acid Plant (ECAAP);
(ii) Supply contract for Ascorbic Acid plant (SCAAP);
(iii) Service agreement for Ascorbic Acid plant (SAAAP); and
(iv) License agreement for Ascorbic acid plant (LAAAP).

Under the ECAAP, Enco was obliged to provide the respondent with the technical information and basic engineering documentation for the construction, commission, operation and maintenance of the Ascorbic Acid Plant. In consideration of Enco's obligation under the Agreement, the respondent was required to pay a total fee of Swiss Francs 86,00,000/- in the manner which was provided in the Agreement. ECAAP as well as the other three agreements had an arbitration clause. In March,1995 with the consent of the respondent, Enco. assigned ECAAP to the petitioner. Because of that agreement all the obligations of Enco towards the respondent were taken over by the petitioner. It appears that the disputes arose between the petitioner and the respondent. The respondent therefore, terminated the agreement and claimed damages. On 31.10.1996 the respondent filed a request for arbitration under the ECAAP before the International Court of Arbitration (ICC) Paris. The petitioner submitted their reply to the claim submitted by the respondent. The petitioner also submitted its counter claim. The respondent appointed Mr.Desai as its nominee on Arbitral Tribunal. The petitioner nominated Prof. ACC Alberto Santa Maria as its nominee on the Arbitral

Tribunal. The appointment of Mr.Desai and the Prof. ACC Alberto Santa Maria as Arbitrators was confirmed by I.C.C. Mr.Richard Fernyhough Q.C. was appointed as Chairman of the Arbitral Tribunal. After considering the claims made by the respondent and the counter claims made by the petitioner, the Arbitral Tribunal made partial Award on 1.2.2000. By that Award all the claims made by the respondent were dismissed and the petitioner was awarded an amount of SFr.44,33,416 Swiss Francs towards the Counterclaims under the ECAAP. The Arbitral Tribunal further called upon the parties to present written representations on interest and cost in terms of Article 20 of I.C.C. Rules of Arbitration so that final award can be made.

2. On or about 20.2.2000 the respondent filed Arbitration Petition no.49 of 2000 before this Court under Section 34 of the Act challenging the partial dated 1.2.2000. The petition was admitted for final hearing on 1.3.2000. The order dated 1.3.2000 passed on the Arbitration petition no.49 of 2000 reads as under:-

"Called for admission.

P.C. : Admit. R & P called."

3. On or about 13.3.2000, the Respondent filed an application no.98 of 2000 under Section 9 of the Arbitration Act. The relief claimed by prayer (a) of that application was the principal relief. Prayer clause (a) of that application reads as under:-

> **"a. that pending the hearing and final disposal of Arbitration Petition no.49 of 2000 this Hon'ble Court be pleased to restrain Respondent Nos.2 to 4 by an order and injunction from receiving any further submissions, and/or passing any further direction and/or Ruling and/or Award in the arbitration proceedings being ICC Case no.9306 of 1996/CK/AER/ACS;"**

The Respondent no.2 to 4 in the petition were members of the I.C.C. Arbitral Tribunal. In the said application filed under Section 9 of the Act, an order dated 13.3.2000 was passed without notice to the respondents in that petition. That order reads

as under :-

> "Heard learned Counsel for the petitioners.
>
> . Issue notice to the respondents returnable after 4 weeks i.e. on 10.4.2000.
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> . Ad-interim relief in terms of prayer clause (a) till 10th April,2000."

This order was continued from time to time till the Arbitration petition no.49 of 2000 was decided. The ICC Tribunal took the view that the interim order passed by this Court in application no.98 of 2000 was not binding on the Arbitral Tribunal and therefore, they decided to proceed further. The petitioner submitted his written submission on interest and cost on 14.3.2001. The respondent however, notified the Tribunal that the respondent does not intend to make any submission on the issue of interest and cost. Mr.Desai the respondent's nominee on the Arbitral Tribunal indicated that he is unable to continue on the Arbitral Tribunal due to the interim order passed by this Court. The International Court of Arbitration therefore, decided to appoint Mr.Ashok Sancheti as replacement co-arbitrator in place of

Mr.Desai and the Arbitral Tribunal made its final Award on 22.10.2001. When the final Award was made Arbitration petition no.49 of 2000 filed by the respondents challenging the partial Award and the interim application no.98 of 2000 were both pending in this Court. Arbitration Petition no.49 of 2000 was decided by this Court by order dated 6.2.2002. This Court held that the partial award which was challenged in the petition filed under Section 34 of the Act being a foreign Award, petition under Section 34 of the Act was not maintainable for challenging that Award. Arbitration Petition No.98 of 2000 was also disposed of. The respondent preferred an appeal against that order before the Division Bench. The Division Bench admitted the appeal on 5.7.2002. That appeal is still pending. In this background, the petitioner filed this petition on 10.2.2005 for enforcement of the partial Award and the final Award. When the petition was filed, it is the contention of the petitioner that there is no period of limitation provided by the Arbitration Act for filing petition for enforcement of Foreign Award and therefore, filing of petition by them is not barred by the Law of Limitation.

. A preliminary objection to the maintainability of the petition was raised on the ground that the petition is barred by the Law of Limitation. On that objection being raised without prejudice to the contention that there is no period of limitation provided by Law for filing petition for enforcement of foreign award, an application for condonation of delay has been filed by the petitioner. Obviously therefore, the first question to be considered is whether Law provides any period of limitation for filing petition under Section 47 of the Act and if Law does provide the period of Limitation what is that period of limitation ?

4. It is submitted that the Arbitration Act does not make provisions of the Limitation Act applicable to the proceedings filed under the Arbitration Act before the Court. It is submitted that the Arbitration Act is a special Law and whenever the Legislature intended to fix period of limitation it has specifically provided for the period in the Act itself. For example in Sections 11, 13, 16, 31 33 and 34 of the Act specific period has been provided. Section 47 of the Act does not lay down any period for filing a petition under that provision. The

petitioner rely on the the judgment of the Supreme Court in the case "Uttam Namdeo Mahale Vs. Vithal Deo & others, (1997)6 Supreme Court Cases 73" to contend that in a special Law when no period of limitation is prescribed the application of general law i.e. the Limitation Act stands excluded. The petitioner also rely on the judgment of the Supreme Court in the Case of "Patel Naranbhai Marghabhai & others Vs. Deceased Dhulabhai Galbabhai & others reported in (1992)4 Supreme Court Cases 264" contending that whether the Special Act provides for specific period of limitation in respect of appeals and makes only certain provisions of Limitation Act applicable to such appeals to that extent only the provisions of Limitation Act stands extended and applicability of other provisions by necessary implications stands excluded. The petitioner also rely on a judgment of the learned Single Judge in the case "ONGC Vs. Jagson Intl.Ltd., reported at 2005(5) Bom.C.R.58" to contend that there is no period of limitation provided for filing an appeal under Section 47 of the Act. On the other hand, according to the respondent, an application under Section 47 of the Act is to be made to a Court, relying on the judgments of the Supreme Court in the cases "Union of

India Vs. M/s.Momin Construction Company, reported at AIR 1995 Supreme Court 1927", "The Kerala State Electricity Board, Trivendrum Vs. T.P.Kunhaliumma, reported at (1976)4 Supreme Court Cases 634" and "Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority reported at (1988)2 Supreme Court Cases 338", it is submitted that when a special Law contemplates an application to be made to the Court the provisions of the Limitation Act apply, if there is no period of limitation provided by the Law under which the application is to be made to the Court. In so far as the judgment of the Supreme Court Case "Uttam N. Mahale" is concerned, it is submitted that that judgment deals with an application for execution under Mamalatdars Court Act. That Act does not contemplates any application being filed for execution and therefore, the observations of the Supreme Court in that case have to be read in the light of the provisions of Mamalatdars Court Act and not as laying down any General proposition.

5. The present petition has been filed under Section 47 read with Section 48 of the Act. Perusal of Section 47 of the Arbitration Act shows that section

contemplates an application to be made to a Court. Rule 803B of the Rules framed under the Arbitration Act by this Court provides that all applications to be made under the Act shall be made by a petition. The term "Court" used in Section 47 of the Act has been defined by explanation appearing below that section. That explanation reads as under:-

> "47. Explanation - In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

Perusal of the definition of term "Court" shows that

the Court to which an application under Section 47 is to be made is a principal civil Court of original jurisdiction. Thus, an application under Section 47 of the Arbitration Act is to be made to a Civil Court of original jurisdiction. Perusal of the provisions of the Arbitration Act shows that so far as initiation of original proceedings under the Arbitration Act are concerned, the first provision is Section 34 of the Arbitration Act. It provides for application to a Court challenging the domestic award and it lays down a specific period of limitation for challenging the Award. Section 37 provides for an appeal against certain orders to a Court and Section 37 does not lay down any period of limitation for filing an appeal under that provision. Section 47 of the Arbitration Act provides for making an application to a Court for enforcement of a foreign Award but the provisions itself does not lay down any period for making the application. Section 50 provides for appeal against the orders passed under Section 45 and Section 48 to a Court but it does not lay down any period of limitation. Now so far as appeals provided to a Court are concerned, even assuming that the Limitation Act applies to those appeals then also because in the Schedule of the

Limitation Act for the appeals to be filed under Section 37 and Section 50 of the Arbitration Act there is no period provided and as there is no residuary article in relation to appeals like article 137 in relation to application, if in the Arbitration Act no period of limitation is provided for making an appeal, the period cannot be imported from the Limitation Act. So far as the applications to the court under the Act are concerned, however, in relation to one application contemplated by the Act to the Court i.e. application under Section 34 of the Arbitration Act, the Act has specifically provided period of limitation but no such period of limitation is provided by Section 47 of the Arbitration Act. According to the petitioner, therefore, as the Legislature has chosen to provide a period of limitation in relation to application filed under Section 34 of the Arbitration Act and the same Legislature has omitted to provide the period of limitation for an application filed under Section 47 of the Arbitration Act, the intention of the Legislature is clear that there should be no period of limitation for making an application under Section 47 of the Arbitration Act. In my opinion, however, the submission cannot be accepted, firstly because of

the provision of Sub-section (1) of Section 43 of the Arbitration Act. Sub-section (1) of Section 43 of the Arbitration Act reads as under:-

> "43. Limitations - (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court."

Perusal of this provision makes it clear that this provision clearly lays down that the provisions of the Limitation Act apply to the proceedings in the Court and they are made applicable to arbitration also. The Arbitration Act defines the term "Court" at three places i.e (i) clause (e) of sub-section (1) of Section (2), (ii) Explanation below Section 47, and (iii) Explanation below Section 56. However, at all the places whatever may be the slight difference in the definition one thing is common, the Court is a principal Civil Court of original jurisdiction. In my opinion, the clear intention of sub-section (1) of Section 43 is to make the provisions of the Limitation Act applicable to the proceedings taken before the principal Civil Court of Original Jurisdiction under the Provisions of the Arbitration

Act except where in the Act itself a contrary provision has been made. Therefore, an application made under Section 47 of the Act to a Civil Court of original jurisdiction would be governed by the provisions of the Limitation Act. It is further to be seen here that the question whether the provisions of the Limitation Act apply in relation to the proceedings taken under the Special statute, has been considered by the Supreme Court in its judgment in the case "Nityananda M.Joshi & others Vs. Life Insurance Corporation of India & others, 1969(2) Supreme Court Cases 199". The Supreme Court in that case was considering whether the period of limitation prescribed by Article 137 of the Limitation Act is applicable to applications made under Section 33-C(2) of the Industrial Disputes Act. The observations made by the Supreme Court in paragraph 3 of that judgment are relevant. They read as under:-

> "3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963 all the other applications mentioned in the various articles

> are applications filed in a court. Further Section 4 of the Limitation Act,1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the court is closed." Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act,1963."

It is clear from the above quoted observations of the Supreme Court that when an application is contemplated by a special statute to a Court then the

provisions of the Limitation Act become applicable. The Supreme Court has considered its judgment in the case "Nityanand Joshi & others Vs. LIC & others" in its judgment in the Case "The Kerala State Electricity Board, Trivandrum Vs. T.P.Kunhaliumma, AIR 1977 Supreme Court 282" referred to above. The Supreme Court after taking stock of the law on the point held that an application contemplated by Section 16(3) of the Telegraph Act to the District Judge was an application to a Civil Court and then in paragraph 22 it observed thus:-

> "22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a Civil Court. With respect we differ from the view taken by the two Judge Bench of this Court in Athani Municipal Council case (AIR 1969 SC 1335) (supra) and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code

> of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

In clear terms the Supreme Court has thus held that when an application is contemplated by any Law to a Civil Court then the provisions of the Limitation Act are applicable. The same view has been reiterated by the Supreme Court in its judgment in the case "Major(Retd.) Inder Singh Rekhi Vs. Delhi Development Authority" referred to above, as also in its judgment in the case "Union of India Vs. M/s. Momin Construction Company" referred to above. So far as the judgment of the Supreme Court in the case "Uttam Namdeo Mahale Vs. Vithal Deo & others" referred to above is concerned, perusal of that judgment shows that it arises out of the proceedings under the Mamlatdar’s Court Act. In the proceedings under that Act an order was issued against the

appellant before the Supreme Court to vacate the land. The appellant before the Supreme Court challenged that order before all the courts including the Supreme Court but failed and the order became final. An application was made by the respondent before the Supreme Court for execution of that order after lapse of a period of 12 years. The High Court relying on the judgment of the Bombay High Court in "Babaji Khanduji Vs. Kushaba Ramaji, 1906(8) Bombay Law Reporter 218, ruled that there is no period of limitation prescribed and therefore, because the execution of the order has been taken up after 12 years the execution is not barred by the Law of Limitation. The Supreme Court by its judgment in the case "Uttam Namdeo Mahale Vs. Vithal Deo and others" has confirmed the order passed by the High Court. The observations that the Supreme Court has made in paragraph 4 of the Judgment, in my opinion, are to be read in the context in which they are made. They have been made in relation to the provisions of Section 21 of the Mamlatdar's Court Act which does not contemplate a party making any application for execution of order made in his favour. The provision casts duty on the Mamlatdar to execute the order. The observations of the Supreme Court in paragraph 4

of the Judgment in "Uttam Namdeo Mahale" case have also to be read in the context of the judgment of the Division Bench of this Court which was followed by the learned Single Judge whose order was challenged before the Supreme Court. The Division Bench of this Court in its judgment in "Babaji Khanduji Vs. Kushaba Ramaji" case has observed thus:-

> " Where a Mamlatdar's decision, as in this case, awards possession, Section 17 of the Mamlatdars' Courts Act imposes on him the duty to issue an order to the village officers to give effect thereto. That duty is in no sense conditional on an application being made to the Mamlatdar for the purpose; it is absolute and unqualified.
>
> . If it be brought to the notice of the Mamlatdar that the duty thus imposed upon him has not been carried out, that is not an application without which the Mamlatdar could not act; it is

> merely a means of apprising the Mamlatdar of the omission on the part of himself or his officers.
>
> . Now there is a long line of authorities in India, e.g. Kylasa Goundan V. Ramasami Ayyan (3), Vithal Janardan V. Vithojirav Putlajirav (4), Ishwardas Jagjivandas V. Dosibai (5), and Devidas Jogjivan V. Pirjada Begam (6), whereby it is established that where an imperative duty of the character we have described is imposed upon a Court, then the Limitation Act has no application."

It is thus clear from the judgment of the Division Bench of this Court quoted above that because Mamlatdars' Courts Act does not contemplate an application to be made by the party in whose favour Mamlatdar has made the order, for implementation of that order the Limitation Act does not apply, and in this background the Supreme Court in its judgment in "Uttam Namdeo Mahale" case has observed thus in paragraph 4:-

"4. Mr.Bhasme, learned counsel for the appellant, contends that in the absence of fixation of the rule of limitation, the power can be exercised within a reasonable time and in the absence of such prescription of limitation, the power to enforce the order is vitiated by error of law. He places reliance on the decisions in State of Gujarat V. Patil Raghav Natha Ram Chand V. Union of India and Mohd. Kavi Mohamad Amin V. Fatmabai Ibrahim. We find no force in the contention. It is seen that the order of ejectment against the applicant has become final. Section 21 of the Mamlatdar's Court Act does not prescribe any limitation within which the order needs to be executed. In the absence of any specific limitation provided thereunder, necessary implication is that the general law

> of limitation provided in the Limitation Act (Act 2 of 1963) stands excluded. The Division Bench, therefore, has rightly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise. The cited decisions deal with that area and bear no relevance to the facts."

The observations of the Supreme Court that in the absence of any specific limitation provided under the Mamlatdars' Courts Act the provisions of the Limitation Act stands excluded, have to be read in the light of the judgment of the Division Bench referred to above which was followed by the learned Single Judge whose order has been confirmed by the Supreme Court in its judgment in "Uttam Namdeo

Mahale" case. So far as the judgment of the learned Single Judge in the case "Oil and Natural Gas Corporation Ltd. Vs. M/s.Jagson Intl.Ltd." is concerned, in that case the Court was considering the question whether the period of limitation provided by Section 34 of the Act for making an application challenging a domestic Award made by the Arbitrator is applicable to an appeal filed under Section 37. The Court negatived that contention holding that the period provided for filing an application under Section 34 of the Act cannot be made applicable to an appeal under Section 37 of the Act because the Act does not make such a provision. The Court also referred to the provisions of the Limitation Act and found that there is no article in the Schedule to the Limitation Actproviding period of limitation for filing appeal under Section 37 of the Act and therefore, on finding that there is no period of limitation provided either under Section 37 of the Arbitration Act or in the Schedule of the Limitation Act and also there is no residuary provision in relation to appeals like the residuary provision under Article 137 in relation to application, the Court after referring to the judgment of the Supreme Court in "Uttam Namdeo Mahale" case has held that

there is no period of limitation prescribed by Section 37 of the Arbitration Act for filing an appeal. I do not see any findings recorded by the Single Judge that the provisions of the Limitation Act are not applicable to an appeal filed under Section 37 of the Arbitration and Conciliation Act. The Court in that judgment has, on the contrary, held that sub-section (1) of Section 43 makes the provisions of Limitation Act applicable to arbitration as it applies to proceedings in Court, implying thereby that the provisions of the Limitation Act are applicable to the proceedings in Court. But even under the Limitation Act as there is neither specific provision providing for a period of limitation for filing appeal under Section 37 of the Arbitration Act or a general residuary provision like Article 137, has held that Law does not prescribe any period of limitation for filing an appeal under Section 37 of the Act. It is thus clear that, in view of the provisions of the Arbitration Act and the Law laid down by the Supreme Court in its judgments referred to above, it cannot be said that the provisions of the Limitation Act are not applicable to an application filed under Section 47 of the Act for enforcement of a foreign Award.

6. Now having held that the provisions of the Limitation Act are applicable to an application filed under Section 47 of the Arbitration Act for enforcement of a Foreign Award, the question arises what is the period of Limitation laid down by the Limitation Act for making such an application? Perusal of the provisions of Section 2(j) of the Limitation Act shows that the period of limitation means period of limitation prescribed for any suit, appeal or application by the Schedule. Therefore, to find out what is the period of limitation provided for making an application under Section 47 of the Act one has to refer to the Schedule of the Limitation Act. Perusal of that Schedule shows that so far as applications are concerned, the period of limitation is laid down by the third division. Perusal of Part-I of the third division of the Schedule of the Limitation Act shows that though there is period of Limitation laid down for making application under the Arbitration Act,1940, there is no period of limitation laid down for making an application either under Section 47 of the Arbitration Act 1996 or for making any application under any other provisions of the Arbitration Act 1996. Part II of the Third

Division of the Schedule is a residuary provision which lays downs the period of limitation for making any application, for which no period of limitation is provided in part I of the Third Division. So far as this aspect of the matter is concerned, according to the petitioner, the period of limitation for making an application under Section 47 of the Act for enforcement of Foreign Award is governed by Article 136 whereas, according to the Respondent, the period of limitation for making an application under Section 47 of the Arbitration Act is governed by Article 137. It is also contended by the petitioner that if this Court ultimately holds that the period of limitation for making an application under Section 47 of the Act is governed by Article 137 then there would be a slight delay in making the application and therefore, that delay should be condoned for the reasons disclosed in the application filed by the petitioner for condonation of delay.

7. It is submitted on behalf of the Petitioner that the Supreme Court in its judgment in the case of Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd., (2001) 6 SCC 356, has held that under the Act a

foreign award is not required to be converted into a decree of the court and that it is already stamped as a decree. That separate applications for recognization and the other for execution of the foreign award are not necessary and that in one proceeding the question of enforcement can also be decided and the award can also be executed. It is further submitted that in the case of Thyseen Stahlunion GmbH vs. Steel Authority, AIR 1991 SC 3923, the Supreme Court has held that under the Act a foreign award is already stamped as a decree. It is submitted that Article 136 of the Limitation Act applies to all decree of Civil Courts except decrees for mandatory injunction. According to the Petitioner, in view of the judgments of the Supreme Court in the case of Furest Day Lawson and Thyseen, a foreign award in itself is a decree. According to the Petitioner, the above view is consistent with the provisions of Section 49 of the Act. An application under Section 47 of the Act is an application for execution of the award as a decree. The deeming fiction under section 49 of the Act applies to a particular court of which the foreign award is a decree and not to the award becoming a decree. It is submitted that for the purpose of Section 49 of the

Act, the term enforcement is used interchangeably with "execution" The Petitioner also relies on a judgment of the single Judge of the Gujarat High Court in the case of Western Shipbreaking Corporation vs. Clare Haven Ltd., reported in 1997(3) Volume 38 Gujarat Law Reporter, 1984. The Petitioner referred to the meaning given to the term "enforcement" in various dictionaries and submitted that when Section 47 of the Act speaks of enforcement, what it really contemplated is execution under Order 21 of the CPC. It is submitted that a foreign award and a decree of a Indian Civil Court is executable under the same provisions and if satisfaction about enforcibility of the Court can be achieved in the same proceedings, why there should be any discrimination and why a separate procedure should be adopted in relation to the foreign award. It is submitted that in its judgment in the case of Furest Day Lawson Ltd., the Supreme Court was considering the judgment of the Delhi High Court, wherein the Delhi High Court had held that until the court records its satisfaction about enforcibility of the foreign award, there is no decree which can be executed, no execution lies for enforcement of foreign award, until the court first records its satisfaction in relation to the foreign

award. It is submitted that in its judgment in the case of Furest Day Lawson Ltd., the Supreme Court has held that the execution application was maintainable treating the foreign award as a decree and that enforcement was one stage in the execution proceedings. It is submitted that no separate application for enforcement is required under Section 49 of the Act and that the question of enforcement can be decided in the execution proceedings itself. Thus enforcement is a step in aid or a step ancillary to execution. It is submitted that even assuming that a separate application was required to be made for enforcement under Section 49, such an application would be governed by the provisions of Article 136 of the Limitation Act. In support of this submission, the Petitioner relies on the judgments of this court in the case of Coovarji varjang and anr. vs. Cooverbai widow of Nagsehy Champsey, AIR 1932 Bom 516 and Ramnath Goenka vs. Amarchand Mangaldas, AIR 1954 Bom. 208. It is submitted that similar provisions under Order 21 Rule 50 of the CPC were considered in these judgments and the application for leave was treated as an execution application to which Article 136 of the Limitation Act applies. It is submitted that the contention that an application for execution

of a foreign award would fall outside the perview of Article 136, because the award is not enforceable is not correct, because the third column of the Article 136 only prescribes the time from which the period starts for filing an application. According to the Petitioner, Columns 2 and 3 of the Schedule to Limitation Act are only relevant for the purpose of calculating the period of limitation in connection with the provisions of the Limitation Act and not to determine the nature of the suit or application set out in the column No.1 thereto. As the period of limiation was provided by Article 136, the residuary Article 137 would not apply. It is further submitted that in any case the question whether the decree has become enforceable for the purpose of the Limitation Act must depend under the terms of decree itself i.e. the decree itself must be either conditional or make its enforcement contingent upon some or other event. That does not apply to enforcement of a foreign award which is stamped as a decree. It is further submitted that any other interpretation of the provisions of Article 136 would not be consistent with the Article 3 of New York Convention, which provides that a contracting State will not impose a substantially more onerous condition for enforcement

of a foreign award, than that is imposed on the recognition or enforcement of domestic arbitral Awards. If the period of limitation for enforcement of foreign award is restricted to 3 years the same would make it more onerous than the period of 12 years provided for enforcing a domestic award.

. In reply, on behalf of the Respondent it is submitted that a foreign award becomes binding under Section 46 of the Act when it becomes enforceable. It is submitted that Section 47 of the Act contemplates an application for enforcement and provides for the parties seeking to enforce the award to perform certain acts. Section 48 provides for enforcement being refused by the court either at the request of the parties against whom it is invoked on the grounds set out in sub-section 1 and 2 and if the court finds that the subject matter is not capable of being settled by arbitration under the law of India or the enforcement of the award would be contrary to the public policy of India. It is only after the court is satisfied that the foreign award is enforceable under Section 49, that it is binding on the parties and is enforceable and can be executed under the procedure prescribed for execution by Order

21 of the C.P.C. Execution proceedings under Order 21 of the C.P.C. can only be initiated after the foreign award is binding and enforceable under Section 49. It is only at that stage, Article 136 of the Limitation Act can apply. For a decree to be executed, it must be capable of execution at the point of time when application for execution is made. In support of this proposition the Respondent relies on a judgment of the Supreme Court in the case of Dr.Chiranjlal v/s. Haridas (2005) 10 SCC 746. **It is submitted that the judgment of the Supreme Court in the case of Fuerst Day Lawson v/s. Jindal Exports, merely lays down that under the Arbitration Act, 1996 there need not be an application for a judgment first, followed by a separate application for execution. It is in this context that it is held that that the foreign award is already stamped as a decree, thereby implying that no separate decree of judgment is to be passed by the court as required by Section 6 of the 1961 Act and Section 6 of the 1937 Act. In that case, an application was filed for execution in the form of an execution application. In that case, limitation was not considered by the Supreme Court. According to the Respondent, the Supreme Court in the same judgment has distinguished**

the two stages. According to the Respondent, the award becomes binding and enforceable and further steps for execution can be taken only in the second stage, till then, it is an application seeking recognisation and not for enforcement. According to the Respondent, the judgment of the Supreme Court in the case of Furest Day Lawson decides only one question and that is whether two separate applications are needed to be made, one for recognition and the second for execution. The question of limitation did not arise. It is submitted that in that case the Supreme Court has not decided whether to the application filed for execution, Article 136 of the Limitation Act applies. The Respondent relies on the judgment of the learned Single Judge of this Court in the case of Tropic Shipping vs. Kothari Global, 2002 (2) BCR 93, and another in the case of Force Shipping vs. Ashapura Minechem, 2003 Vol. 105 (3) BLR 948 to contend that the learned single Judge of this Court has already considered the judgment of the Supreme Court in the case of Thyseen as also Fuerst Day Lawson and held that the Supreme Court has not bypassed the provisions of Order 21 of the C.P.C. and has also held that it is only after the courts hold that the

award is enforceable under Section 49, that it can be executed under Order 21. It is submitted that this court has interpreted two judgments to mean that though one application can be made for recognition and execution, the question of execution arises only after the Award is recognised as a valid and enforceable Award. The Respondent relies on the rules framed by this Court under the Arbitration Act and submits that the rules contemplates separate applications, one under Section 47, which can be filed under Rule 803 (C)(c) and other for execution under Rule 803(H),(I) and (J). It is submitted that Article 136 of the Limitation Act must be read as a whole. The third column postulates that the 12 years period only commences when (a) the decree or order becomes enforceable, or (b) where the decree or any subsequent order directs any payment of money or delivery of any property to be made at a certain date or at recurring periods when default takes places. Under the scheme of the 1996 Act, a foreign award is only deemed to be a decree u/s 49, after the stages contemplated in sections 47 and 48 are completed and the Court is satisfied that the foreign award is enforceable. Till then it cannot be considered to be a decree. Thus, Article 136 is not attracted until

the stage contemplated u/s 49 is reached. An application filed under Section 47 read with Rule 803 (c)(c) will be governed by the Article 137 of the Limitation Act. It is submitted that what is held by the Supreme Court in Fuerst Day Lawson is that one application for recognisation and for execution is maintainable. It has not held that separate application one for recognisation and second for enforcement is not maintainable. According to the Respondent, when an application for recognisation and execution of the foreign award is made, it is not covered by the provisions of Article 136 of the Limitation Act, but would be governed by the residuary Article 137 of the Limitation Act.

8. To appreciate the rival contentions, it is necessary first to refer to the scheme of the Act. So far as the foreign awards are concerned, in the Act the provisions are contained in Part-II of the Act. The heading of the Part-II of the Act is "Enforcement of certain foreign Awards". Part-II has been divided into two Chapters. Chapter 1 relates to enforcement of New York Convention Awards and Chapter 2 deals with enforcement of Geneva Convention Awards. In the present case we are concerned with Chapter-1.

. Section 44 in Chapter-1 of Part-II of the Act defines the term "Foreign Award". Section 45 of the Act deals with the power of judicial authority to refer parties to arbitration. Section 46 lays down as to when the foreign award is binding. Section 47 lays down the procedure for making an application for enforcement of the foreign awards. Section 48 lays down the conditions for enforcement of foreign awards. Section 49 declares when the foreign award is deemed to be a decree of the court.

. Section 46 of the Act reads as under:-

> 46. When foreign award binding- Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.

. Reading of Section 46 of the Act quoted above shows that a foreign award is not considered to be binding in India on the parties to that award immediately after that award is made. But the award is considered to be binding on the parties only when it is found to be enforceable under Chapter-1 Part-II of the Act. Once it becomes binding, it can be relied on by the parties by way of defence, set off or otherwise in any legal proceedings in India. The provisions make it clear that a foreign award which is yet to be found to be enforceable by the competent court cannot be relied on for any purpose in India. It is also not considered to be binding on the parties to the award in India, till the competent court finds it to be enforceable. Finding of the court that the foreign award is enforceable is necessary not only for the purpose of executing that award as a decree, but it is necessary also for relying on that award for any purpose in India. Thus, the term enforcement of a foreign award does not mean merely execution of that award as a decree, but it also includes using that award as a defence in legal proceedings for claiming set off on the basis of that award etc. Execution of the foreign award as

a decree is only one facet of enforcement. Enforcement of a foreign award is a larger term than execution of the award. In other words, enforcement of a foreign award includes execution of that award as a decree.

. Section 47 as observed above, lays down as to how an application for enforcement of foreign award is to be made. It is only sub-section 1 of Section 47 which is relevant. It reads as under:-

> 47(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court-
>
> (a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
>
> (b) the original agreement for arbitration or a duly certified copy thereof; and
>
> (c) such evidence as may be necessary to prove that the award is a foreign award.

. The next provisions which is relevant is Section 48. Sub-section 1 and sub-section 2 of Section 48 are relevant. They read as under:-

> 48.Conditions for enforcement of foreign awards-
>
> (1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the Court proof that-
>
> (a) the parties to the agreement referred to in section 44 were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Enforcement of an arbitral award may also be refused if the Court finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

. Perusal of the above quoted provisions shows that under sub-section 1, the court can refuse to enforce the award only after the Respondent in those proceedings satisfies the court that the award is not enforceable for the reasons enumerated in sub-section 1 of Section 48. In other words, sub-section 1 of Section 48 casts the burden of proof on the Respondent to show that the foreign award, enforcement of which is sought, is not enforceable. In other words, if the Respondent in a petition either does not appear or fails to discharge the burden, the court would be justified in enforcing the award. So far as sub-section 2 of Section 48 is concerned, it confers powers on the court to refuse

to enforce an award, if the court is satisfied that the subject matter of the difference is not capable of settlement by the arbitration under the law of India or the enforcement of the award would be contrary to the public policy of India. In other words, sub-section 2 casts the burden of proof on the Petitioner to satisfy the court that the subject matter of the award of which he is seeking enforcement is capable of being settled by arbitration under the law of India and that the award is not contrary to the public policy of India.

. Then comes Section 49, which is a declaratory provision. It reads as under:-

> 49. Enforcement of foreign awards- Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.

. Reading of the above provisions makes it clear that when in a petition under Section 47, the court finds that the Respondent has not been able to show that the award is unenforceable and when the court is satisfied that the subject matter of the award is

arbitrable under the law in force in India and that the award is not contrary to public policy of India, the award is deemed to be a decree of that court.

. The definition of the term " court" is found in explanation below Section 47, which has been quoted above and I have already observed that the court within the meaning of that explanation is essentially the principal civil court of original jurisdiction. Thus, after the principal civil court of original jurisdiction records a finding that the award is enforceable, that award is deemed to be a decree of that court. I.e., it is at that point of time that the award becomes a decree of the civil court. Now it will be useful to refer to Article 136 of the Limitation Act. It reads as under:-

Article-136

Description of application- For the execution of any decree (other than a decree granting a mandatory injunction) or other of any civil court.

Period of limitation- Twelve years.

Time from which period begins to run- (When) the decree or other becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place;

Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

. Perusal of the above quoted Article 136 makes it clear that in order to attract the application of this Article, the decree or order of which the execution is sought must be a decree or order of any civil court. It is contended on behalf of the Petitioner relying on the judgment of the Supreme Court in the case of Fuerst Day Lawson vs. Jindal Exports, (2001) 6 SCC 356, and Thyseen Stahlunion vs. Steel Authority of India, (1999) 9 SCC 334, that a **foreign award is stamped as a decree. Reading of the**

judgments of the Supreme Court in the case of Thyseen as also in the case of Fuerst Day Lawson shows that though the Supreme Court says that a foreign award is stamped as a decree, it nowhere says that a foreign award, moment it is pronounced by the arbitrator is stamped as a decree of the civil court. It is clear from the scheme of Chapter-I of Part-II of the Arbitration Act referred to above that a foreign award is deemed to be a decree of the civil court only after a finding is recorded by the court that is enforceable. Therefore, to the execution of that award, Article 136 of the Limitation Act would become applicable only after that award is deemed to be a decree of the court which records the finding that it is enforceable by virtue of the provisions of Section 49 and at no earlier point of time. At this stage, it becomes necessary to see the judgments of the Supreme Court in the case of Thyseen Stahlunion and Fuerst Day Lawson to find out as to in what context the Supreme Court has said that a foreign award is stamped as a decree. Whether those observations of the Supreme Court are enough to attract the application of Article 136 of the Limitation Act to enforcement of the award which has not become binding on the parties in terms of the provisions of Section

46 of the Act.

9. As observed above the first judgment of the Supreme Court relied on by the petitioner to claim that the period of limitation for making an application under Section 47 would be governed by Article 136 of the Limitation Act is the judgment of the Supreme Court in the case of "Thyssen Stahlunion GMBH Vs. Steel Authority of India Ltd." referred to above. In that case one of the questions that was considered by the Supreme Court was whether in a case where foreign award is made after the date of commencement of 1996's Act but where the arbitration proceedings commenced before the commencement of the Act for enforcement of the Foreign Award would the provisions of the Act be applicable? That question was considered by the Supreme Court in the light of various provisions of the Act specially in the light of the provisions of Section 85 of the Act. The Supreme Court held that the provisions of the Act which are repealed by the Act are not kept alive for enforcement of the foreign Award where the arbitration proceedings have commenced before the commencement of the Act. The Supreme Court then considered the question as to what is the difference

between the provisions of the Act and the two repealed Acts relating to enforcement of the foreign Awards, and the Supreme Court has observed thus:-

> "As a matter of fact if we examine the provisions of the Foreign Awards Act and the new Act there is not much difference for the enforcement of the foreign award. Under the Foreign Awards Act when the court is satisfied that the foreign award is enforceable under that Act the Court shall order the award to be filed and shall proceed to pronounce the judgment accordingly and upon the judgment so pronounced a decree shall follow. Sections 7 and 8 of the Foreign Awards Act respectively prescribe the conditions for enforcement of a foreign award and the evidence to be produced by the party applying for its enforcement. The definition of foreign award is the same in both the enactments. Section 48 and 47 of the new Act

> correspond to sections 7 and 8 respectively of the Foreign Awards Act. While Section 49 of the new Act states that where the Court is satisfied that the foreign award is enforceable under this Chapter (Chapter I, Part II, relating to New York Convention Awards) the award is deemed to be a decree of that court. The only difference, therefore, appears to be that while under the Foreign Awards Act a decree follows, under the new Act the foreign award is already stamped as a decree. Thus, if the provisions of the Foreign Awards Act and the new Act relating to enforcement of the foreign award are juxaposed there would appear to be hardly any difference."

The Supreme Court thus held that the only difference between the provisions of the Foreign Awards Act and the Act in so far as enforcement of foreign awards is concerned, under the Foreign Awards Act, the Court

had to pronounce a judgment in terms of the Award and that judgment became a decree. Whereas under the new Act the Court is not required to pronounce judgment in terms of the Award but the Award itself become a decree on the Court recording its satisfaction that the Award is enforceable. The second judgment relied on by the petitioner is the judgment of the Supreme Court in the case Furest Day Lawson. In that case the question that the Supreme Court was considering was whether a party which has a foreign Award in its favour has to submit two applications for enforcement of that foreign Award, one application for recognition of that foreign Award by the Court and the second application for execution of that Award which gets converted into a decree on the Court recording its satisfaction that the Award is enforceable. The entire discussion on this aspect of the matter in the judgment of the Supreme Court in Furest Day Lawson Ltd. is to be found in paragraphs 30 and 32 of the judgment which reads as under:-

> "30. Alternatively it was contended that a party holding a foreign award has to file a separate application and produce evidence as contemplated

under Section 47 and also satisfy the conditions laid down under Section 48 and it is only after the court decides about the enforceability of the award, it should be deemed to be a decree under Section 49 as available for execution. In other words, the party must separately apply before filing an application for execution of a foreign award.

31. If the argument of the respondent is accepted, one of the objects of the Act will be frustrated and defeated. Under the old Act, after making award and prior to execution, there was a procedure for filing and making an award a rule of court i.e. a decree. Since the object of the Act is to provide speedy and alternative solution to the dispute, the same procedure cannot be insisted upon under the new Act when it is

advisedly eliminated.

. Thus, in our view, a party holding a foreign award can apply for enforcement of it but the Court before taking further effective steps for the execution of the award has to proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that the foreign award is enforceable, it can proceed to take further effective steps for execution of the same.

. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence

in the view we have taken."

In the case before the Supreme Court an application for execution of the foreign award was made and that application for execution was held not to be maintainable by the High Court because according to the High Court first the person in whose favour the Award is made had to apply for recognition of the Award and then only an application for execution of the Award could be made. From the observations of the Supreme Court quoted above, it is clear that it is not necessary for the person who has foreign Award in his favour to apply for recognition of the Award by the Court separately , he could make application for execution of the Award and in that application a request for inquiry by the Court as required by the Statute to find out whether the Award is enforceable is implicit and the Court in that application can make an inquiry as to the enforceability of the Award and the Court after recording its satisfaction that the Award is enforceable can proceed to execute that Award as if the award is a decree made by that court. Neither in the judgment in the case of Thyseen Stahlunion GMBH" nor in the judgment in the case

Furest Day Lawson Ltd. the Supreme Court has considered the question by referring to the provisions of the Limitation Act nor did it consider the question as to by which article in the Schedule of the Limitation Act limitation for making an application for execution of the foreign award would be governed. All that the Supreme Court has stated is that a separate application for recognition of the Award is not necessary because now the Court is not required to pronounce judgment in terms of the Award in order that that judgment operates as a decree. Now an application for execution can be made and in that application there would be an implied prayer for holding an inquiry into the enforceability of the Award and the Court will proceed to execute it as a decree in case it is satisfied that the Award is enforceable. The Supreme Court has in clear terms said in the judgment in the case Furest Day Lawson Ltd. that there will be two stages in enforcement of foreign award, first stage would be of the Court making an inquiry into enforceability of the Award and the second stage would commence in case the Court holds that the Award is enforceable. It therefore, follows that in case the Court holds either on the other side satisfying it under Sub-section (1) of

Section 48 of the Act that the Award is not capable of being enforced or the Court under sub-section (2) of Section 48 of the Act on its own finding that the Award is not capable of being enforced then there would be no question of execution. In my opinion, the observations of the Supreme Court in its judgment in the case "Thyssen Stahlunion GMBH" which is quoted by the Supreme Court in its judgment in Furest Day Lawson Ltd. that under the Act the Foreign Award is stamped as a decree is made only to indicate that now under the Act, as was necessary under the repealed Foreign Awards Act, the Court is not required to pronounce judgment in terms of the Award so that judgment operates as a decree. Now under the Act on the Court being satisfied that the Award is enforceable the Award itself operates as a decree. But it is clear from the provisions of Section 49 of the Act which are quoted above, the Award operates as a decree only on the Court recording its satisfaction that it is enforceable and it is only at that point of time that the Award becomes a decree of that Court which has recorded its satisfaction that it is enforceable. As observed above Article 136 of the Schedule of the Limitation Act becomes applicable for execution of any decree or order of any Civil Court.

Till the Court records satisfaction contemplated by section 49 of the Arbitration Act the foreign Award is not deemed to be a decree of that court. Therefore, when an application is filed before the Court, before the Court has recorded its satisfaction that the foreign Award is enforceable, it will not to be an application for execution of any decree or order of any Civil Court. It will be an application for execution of an Award which is capable of being converted into a decree and obviously therefore, Article 136 of the Schedule of the Limitation Act would not apply to such an application. There is no period of limitation provided by any of the Article in the Schedule of the Limitation Act specifically for making an application for execution of a foreign Award which is capable of being converted into a decree of the Civil Court, and therefore, such an application would be governed by the residuary Article 137 and therefore, an application for execution of a foreign Award which has not become a decree, has to be made within a period of three years from the date on which the right to make such an application accrues. In my opinion, placing such interpretation would also be in favour of the persons who are holding foreign awards in their favour,

because they can apply for recognition of the foreign award within a period of three years of the right to apply accruing to them and after the Court records satisfaction contemplated by Section 49 of the Act, the Award becomes a decree and they get further period of 12 years under Article 136 to apply to the Court for execution of that Award. In any case, the judgment of the Supreme Court in the case of "Thyssen Stahlunion GMBH" or in the case of Furest Day Lawson Ltd. cannot be taken to mean that it is compulsory for a person who is holding a foreign award in his favour to make an application for execution. All that the Supreme Court says is that such a person can make an application for execution even before the Court has recorded its satisfaction as contemplated by Section 49 of the Act. It is always open to a person who is holding a foreign Award in his favour to make an application only for recognition of the foreign Award and thereafter to make a separate application for execution of the Award which has become a decree after the Court records its satisfaction. I find that similar view has been taken by the learned Single Judge of this Court in the judgment "Tropic Shipping Co.Ltd. Vs. Kothari Global Limited, 2002(2) Bom.C.R.93". The learned

Single Judge has observed thus:

> "The learned Counsel however, on behalf of the respondent sought to place reliance on the judgment of the Apex Court in (Thyussen Stahlunion GMBH V. Steel Authority of India Ltd.), 1999(9) S.C.C. 334 to point out that in so far as Foreign Awards (Recognition and enforcement) Act is concerned, decree follows but under the new Act, the foreign Award is already stamped as the decree. This according to learned Counsel would be the distinguishing factor to hold that the Court while considering enforcement of Foreign Award is considering the decree itself. In my opinion, the judgment in Thyssen GMBH (supra) cannot be so read considering the express language of section 49 of the Act of 1996. The Foreign Award continues to remain an award in the country. It is deemed

> to be a decree only when the Court to which the application is made for enforcement of the foreign award is satisfied that the Foreign Award is enforceable. To my mind therefore, objection under Section 22 of the SIC(SP) Act,1985 must be rejected."

The same learned Single Judge has considered the judgment of the Supreme Court in the Case "Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd." in the case of "Force Shipping Ltd. Vs. Ashapura Minechem Limited, 2003 Vol.105(3) Bom.L.R. 948". The observations made by the learned Single Judge in paragraphs 5 and 6 are relevant. They read as under:-

> "5. In the light of that, petition made absolute. The learned Counsel for the petitioner had also drawn my attention to the judgment of the Apex Court in the case of M/s.Furest Day Lawson Ltd. V. Jindal Exports Ltd.. IN that case one of the contention raised was that the Court

could not have permitted conversion of the application for execution of the decree into one for enforcement of award. The Apex Court refused to interfere. It also considered the procedural aspect of enforcement of foreign award and observed that once the Court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a Rule of Court/decree again.

6. Those observations cannot mean that the Apex Court has bypassed altogether the provisons of Order 21 of the Code of Civil Procedure. Under section 49 where the Courts hold that the award is enforceable, then it is deemed to be decree of that Court. The decree of that Court under Municipal Law can only be executed in terms of Order 21 of the C.P.C. There is no other

mechanism for Courts in India to enforce a decree. A party seeking enforcement must call on the Court to seek enforcement by one of the methods as provided under Order 21. If the property attached and sold is not sufficient to satisfy the award and there is property of the respondent in some other jurisdiction, the procedure at least within the territorial limits of India would be to transfer the decree. We have framed the rules pursuant to the coming into force of the Arbitration and Conciliation Act,1996 being rules 803(g) to 803(k) sets out that execution application should be presented to the Court within whose jurisdiction the person ordinarily resides or property against whom execution is sought is situated. Under section 47 it contemplates applying for enforcement of foreign award and satisfying mandate of section 47.

> Therefore, on a harmonious consideration and to enable to give effect to the judgment of the Apex Court in M/s.Fuerst Day Lawson Ltd. (supra) all that can be said is that along with application for enforcement a party seeking enforcement may also apply for execution in the form prescribed so that once the Court proceeds to hold that the Award is enforceable, it can thereafter proceed to execute the decree without further procedural requirements. In the instant case, as the petitioners have not applied for execution, it is open to them to move for execution of the award."

10. To conclude, therefore, in my opinion if a person in whose favour the Foreign Award is made desires to make an application for execution of that Award when the Court is yet to record its satisfaction that the Award is enforceable, the

period of limitation for making such an application would be governed by Article 137 of the Schedule of the Limitation Act. According to Article 137 the period of limitation is three years from the date when the right to apply accrues. In the present case, right to apply for execution/enforcement of the foreign award would accrue to the petitioner when the final award was made on 22.10.2001. The final award was received by the petitioner on 6.11.2001. On receiving the Award the petitioner became entitled to seek enforcement of that Award. Therefore, the period of limitation will start running from the date on which the right to apply accrues. The right to apply accrued on 6.11.2001. Therefore, the period of limitation started running from 7.11.2001 and the period of three years would be over on 7.11.2004. The present petition has been lodged in the Court on 10.2.2005. Thus there is a dalay of three months and about 2 days in filing the application. The Affidavit in support of this petition was signed in Italy on 25.1.2005. The Petition, thus, is filed after expiry of the period of limitation, therefore, the petitioner has taken out notice of motion No.821 of 2006 for condonation of delay in filing the petitioner. That notice of motion has been taken out

under Section 5 of the Limitation Act. The question therefore, now to be considered is 'whether the delay from 7.11.2004 to 9.2.2005 is to be condoned or not.' Perusal of the affidavit filed in support of the notice of motion shows that according to the petitioner, till the petition filed by the respondent under Section 34 of the Act challenging the Award was pending, the petitioner was under a bonafide belief that as that petition is pending the petitioner cannot make an application seeking enforcement of the Award. After that petition was dismissed by a Single Judge of this Court, an appeal was preferred by the respondent against that order and that appeal was admitted and that appeal is even now pending. According to the petitioner, the petitioner was under a bonafide belief that because now the appeal is pending, he cannot file petition for enforcement of the Award. But during the pendency of the petition, the petitioner changed its Lawyer who considered the matter afresh and advised the petitioner that pendency of the appeal does not come in the way of the petitioner filing petition for enforcement of the Award and therefore, acting on that advice the petitioner filed the present petition. According to the petitioner, the delay occurred because of the

bonafide belief of the petitioner that he cannot file a petition for enforcement of the Award till the appeal is pending. The petitioner was also under bonafide impression that the Arbitration Act does not provide for any period of limitation for making an application for enforcement of foreign award. The petitioner claims that he was under a bonafide belief that even if the Limitation Act applies the period of limitation for making an application for execution is 12 years and therefore, this petition was not filed earlier. It is submitted that in any case it cannot be said that the petitioner has not filed his petition for enforcement of the Award with malafide intention because the petitioner is holding the Award and therefore, obviously the petitioner is interested in its enforcement. Therefore, unless the petitioner was under a bonafide belief that it cannot make an application for enforcement of the Award it would not have withheld making an application for enforcement. On behalf of the respondent it is submitted that though the petitioner claims that it was under the belief that as the petition filed by the respondent was pending and then appeal was pending therefore, he could not make an application. The petitioner has given explanation which is incapable of acceptance

about change of the lawyer by the petitioner and that on receiving fresh advice from that lawyer application was filed. It is submitted in the affidavit filed in support of the notice of motion a statement is made that the petitioner changed the Lawyer on or about 25-1-2005. However, the affidavit in support of the motion itself is sworn on 25-1-2005. It was submitted that a false reason has been given and the true facts have been suppressed by the petitioner for seeking condonation of delay. After going through the affidavit filed in support of notice of motion, I find that there is definitely a mistake committed by the petitioner in stating as to when they received advice that they can file petition for enforcement of the Award even when the Appeal filed by the respondent is pending. In my opinion, however, even if that aspect is totally ignored then also delay in filing the present petition deserves to be condoned. It is contended on behalf of the petitioner that because the Arbitration Act does not provide for any period of limitation, they were under the bonafide impression that there is no period of limitation prescribed and even assuming that there is period of limitation provide because it is a execution application the period of limitation is 12

years. I have considered both the questions in this very judgment above and I find that it cannot be said that the belief of the petitioner either that there is no period of limitation prescribed or that the period of limitation would be 12 years was not bonafide. The least that can be said is that the question as to whether any period of limitation is prescribed for making an application for enforcement of the Foreign Award and if there is period of limitation prescribed what would be that period of limitation, was not a question free from doubt. Therefore, in my opinion, the delay deserves to be condoned. The observations of the Supreme Court in its judgment in the case "Maria Christine De Souza Soddar and others Vs. Maria Zurna Pereira Pinto and others, AIR 1979 Supreme Court 1352, in my opinion, are relevant in this regard. The Supreme Court in paragraph 5 has observed thus:-

> "It is really unnecessary for us to decide this question in view of the application for condonation of delay for filing the said appeal in the Judicial Commissioner’s Court at Goa, that has been made by the

appellants before us which we are inclined to grant. It cannot be gainsaid that the aforesaid question of limitation is a complex one and not free from doubt and if in such a situation the appellants bonafide believing that the appeal could be filed within 90 days as provided by Art.116 of the Limitation Act,1963 filed their appeal within that period, it would be a clear case of sufficient cause which could be said to have prevented them from filing the appeal within the time prescribed by the Portuguese Code. Where two views are equally possible on this complex question and where a party being guided by one of such views adopts a course consistent with that view it would equally be a case of "just impediment" within the meaning of Art.145 of the Portuguese Code, which could be said to have prevented the party from filing the appeal within limitation prescribed

by the Portuguese Code. IN the application made for condonation of delay the appellants have categorically stated that they bonafide believed, presumably on legal advice, that Article 116 of the Limitation Act,1963 was applicable and they had acted bonafide in filing the appeal in the Judicial Commissioner’s Court within a period of 90 days as per that provision. In the circumstances, we grant the application for condonation of delay and direct that the appeal (being Civil First Appeal No.6 of 1968) be taken on file and be disposed of by the Judicial Commissioner’s Court on merits in accordance with law. The appeal before us is accordingly allowed but in the circumstances of the case there will be no order as to costs. We trust that Civil First Appeal No.6 of 1968 will be disposed of expeditiously."

In my opinion, the most important circumstance in the present case which is in favour of holding that the petitioner did not file this application earlier for bonafide reasons is that the petitioners are the persons who are holding the foreign award in their favour, and therefore, naturally they will be eager to enforce that Award and if they have not approached for enforcing the Award immediately shows that they were under the bonafide belief that they cannot make the application. Unless they were under that belief there was no other reason for not making the application immediately. In other words the Petitioner can not get any benefit by delaying enforcement of the Award. On the contrary because the Petitioner filed the application late, they have lost time.

. Rules of limitation are not mean to destroy the rights of the parties. Their purpose is to ensure that the parties do not resort to dilatory tactics, but seek their remedy promptly. Condonation of delay in making an application to the court is in the discretion of the court. This discretion has been deliberately conferred on the court by the

legislature in order that judicial powers and discretion in that behalf should be exercised to advance substantial justice. This discretion conferred on the court is to be exercised upon the principles which are well understood. The term "sufficient cause" should receive liberal construction so as to advance the substantial justice when no negligence, inaction or want of bonafide is immutable to the applicant. The Supreme Court in its judgment in the case of N. Balakrishnan v/s. M.Krishnamurthy, AIR 1998 SC 3222 in paragraph 13 has observed thus:-

> It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then Court should lean against acceptance of the explanation.

. If the explanation that has been given by the applicant for delay in making the application cannot be termed as malafide or if the act of the applicant of not making the application within the period of limitation provided by the law cannot be termed as dilatory tactics, then in view of the law that has been laid down by the Supreme Court, the delay deserves to be condoned. In the present case, as observed above, it can not be said that the explanation that has been given by the applicant for not approaching the court earlier (the applicant being under a bonafide impression that till the appeal filed by the Respondent is pending in this court, the applicant cannot file the application, that there is no period of limitation provided for making the application under Section 47 that the application for enforcement being an execution application the period of limitation is 12 years) cannot be termed as mala fide. No interest of the applicant can be said to be served, who is having award in his favour, by delaying making an application for conversion of that award into a decree. For all these reasons, therefore, in my opinion, the delay in filing the present petition

deserves to be condoned.

Notice of motion No.826 of 2006 is, therefore, granted in terms of prayer clause (a).

11. Now, challenges raised by the Respondent to the award on merits are to be considered. The first challenge is that the final award is not enforceable, as the award is passed by the arbitral tribunal in disobedience of orders of this court and therefore, the final award is a nullity. It is submitted that after the partial award was made on 1-2-2000, the Respondent filed Arbitration Petition No.49 of 2000 challenging the partial award under Section 34 of the Act. The Petition was admitted for final hearing by order dated 1st March, 2000 and R & P was called. Since the Chairman of the Tribunal was not clear on what the terms "R & P" means, the Respondent submitted opinion of a retired Chief Justice of India to the tribunal, but still the tribunal did not comply with the order and did not send the Record and proceedings of the arbitral proceedings to the court. Since, the arbitral tribunal appeared to be inclined to proceed further, the Respondent filed an application under Section 9 of the Act before this

court. On that application, this court on 13-3-2000 made an order granting injunction in terms of prayer clause (a) of that application restraining the arbitral tribunal from proceeding further in the matter. Though the order was communicated to the arbitral tribunal, the arbitral tribunal in disobedience of that order proceeded further and made the final order. It is submitted that the tribunal despite being fully aware of the court's orders acted in breach of that order and therefore, the final award made by the arbitral tribunal is a nullity. The Respondent relies on a judgment of the Supreme Court in the case of Tayabbhai M. Bagasarwalla and anr. v/s. Hind Rubber Industries Pvt.Ltd., (1997) 3 SCC 443. It is also submitted that the enforcement of the final award which has been made in breach of the order passed by this Court is contrary to the public policy of India.

. In reply, it is submitted that the submission of the Respondent that as the final award has been made in breach of the order of the injunction dated 13-3-2000, is unenforceable has no substance. The order dated 13-3-2000 made by this court is a nullity in the eye of law and is ab-initio void. The order

was made in a petition filed under Section 9 of the Arbitration Act. Under Section 9 the court has no jurisdiction or authority to make an order against the arbitral tribunal. In support of this proposition, the Petitioner relies on the judgment of the Supreme Court in the case of Bhatia International v/s. Bulk Trading S.A. and another, (2002) 4 SCC 105. It is further submitted that the order dated 13-3-2000 is a nullity also for the reason that it has been passed against an absent foreigner i.e. the arbitrators who had not submitted to the jurisdiction of this court. It is submitted that such an order is abinitio-void in international law and is not required to be obeyed. It is further submitted that under Section 9 no order could have been made injuncting the foreign arbitral tribunal from proceeding with the arbitral proceedings. If at all the injunction could have been granted against a party to the arbitration, it is submitted that there is no public policy of India which requires absent foreigners to obey void orders of injunction made by the courts in India. Making of the final award during the operation of the order dated 13-3-2000 does not render the award a nullity as contended. Relying on the judgment of the Supreme Court in the

case of Kiran Singh and ors, v/s. Chaman Paswan and ors, AIR 1954 SC 340, a judgment of the Supreme Court in the case of Harshad Chiman Lal Modi v/s. DLF Universal Ltd. and anr., (2005) 7 SCC 791, the Respondent submitted that an order which is null and void can be challenged at any time even in collateral proceedings and when the court declares that order to be nullity, that declaration operates from the date on which that order was made. It is further submitted that the judgment of the Supreme Court in Tayabbhai's case relied on by the Respondent does not apply to the present case, because that case arose out of the order of temporary injunction made in the proceedings to which Civil Procedure Code applies and because of the Section 9A of the Civil Procedure Code, the court has power to make an ad-interim order even in a suit where it is alleged that it does not have jurisdiction. The Petitioner also relies on the judgment of the Division Bench of this Court in the case of Vivekanand Atmaram Chitale 1984 Mh.L.J. 500.

. The submission of the Respondent that the final award is unenforceable is based on interim order dated 13-3-2000 made by a learned single Judge of this Court. Admittedly that order was made in a

petition filed under Section 9 of the Arbitration & Conciliation Act. Section 9 of the Act reads as under:-

> 9. Interim measures etc. by Court.
>
> A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings, or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation interim custody or sale of any goods which are the subject matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the

arbitration.

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver.

(e) such other interim measure of protection as may appear to the Court to be just and convenient.

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

. Perusal of the above quoted Section 9 shows that it does not vest power in the court to issue any interim directions or orders to the arbitral tribunal. I have also not been pointed out any other provision in the Arbitration Act, which can be said to confer jurisdiction on the court to issue interim directions, of the nature which has been issued by this Court on 13-3-2000 against arbitral Tribunal.

11A. The Supreme Court in its judgment in the case of Bhatia International v/s. Bulk Trading S.A. and anr., (2002) 4 SCC 105, in paragraph 29 has **categorically held that under Section 9 of the Arbitration Act, a direction to the arbitral tribunal cannot be made. Paragraph 29 reads as under:-**

> **29. We see no substance in the submission that there would be unnecessary interference by courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) thereof.**

> Thus there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act.

. Thus, I find that this court had absolutely no jurisdiction to make the order dated 13-3-2000 and therefore that order was clearly a nullity in the eye of law.

11B. The order dated 13-3-2000 was made by this Court against the arbitral tribunal. The arbitral tribunal was constituted by the ICC Court of Arbitration, London. Two of the three members of the arbitral tribunal were foreigners. In that petition, the learned single Judge of this court exercised the jurisdiction under Section 9 of the Act, which is a legislation made by the Parliament of India. The operation of the municipal statute in relation to foreigners is subject to limitation. A statute made by the Parliament operates throughout India and also

extends to territorial waters and will govern persons within the territories of India. The Indian Parliament does not have power to legislate in relation to foreigners who are not within the territory of India and within the territorial waters of India. The Indian statutes are ineffective against the foreigners outside the territories of India. The Supreme Court in its judgment in the case of British India Steam Navigation Co. Ltd. vs. Shanmughavilas Cashew Industries & Ors., 1990(3) SCC 481 has considered this question and has relied on **the observations of the Privy Council in the case** Sirdar Gurdyal Singh vs. The Rajah of Faridkote, **1894 AC 670 = 10 TLR 62. Relevant observations are to be found in para 20 of the judgment of British India Steam Navigation, which read as under:-**

> **20. The Privy Council in Sirdar Gurdyal Singh v. Rajah of Faridkote decided that no territorial legislation can give jurisdiction in a personal action which any foreign court should recognise against absent foreigners owing no allegiance or obedience to the power which so legislates. Lord Selborne said:**

> "In a personal action to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced."
>
> There may however be submission to the jurisdiction of an Indian court by litigating in India. The question then is what would amount to submission to jurisdiction.

Thus, apart from section 9 not conferring jurisdiction on this court to make an order against the arbitral tribunal, in view of the fact that the arbitral tribunal was constituted by the ICC International Court in London and two of the three members of the arbitral tribunal were foreigners, who

were not in India, this court had no jurisdiction to make the order dated 13-3-2000 and therefore for this reason also the order dated 13-3-2000 is a nullity.

12. In fairness of the Respondent, it is to be said that even on behalf of the Respondent no attempt was made to say that the order dated 13-3-2000 was within the jurisdiction of this Court, in a petition filed under Section 9. The submission of the Respondent is that even assuming that this court did not have the jurisdiction to make the order dated 13-3-2000, till that order is set aside, it was binding on the arbitral tribunal and therefore, the final award made by the arbitral tribunal is a nullity in the eyes of law. In support of this submission, the Petitioner relies on a judgment of the Supreme Court in the case of Tayabbhai. Perusal of the judgment of the Supreme Court in the case of Tayabbhai shows that in that case the Supreme Court was considering the question whether a person who disobeys the order of interim injunction made by the civil court can be punished under Rule 2A of Order 39 of the C.P.C., where it is ultimately found that civil court has no jurisdiction to entertain and try the suit. The Supreme Court has

considered this question with reference to the provisions of Section 9A of CPC and the Supreme Court has also considered the general principles. The Court has held that even when the jurisdiction of the court to entertain the suit is challenged because of Section 9A, the court has power to make an ad-interim order in that suit. It has held that without even Section 9A also the court will have the jurisdiction to make an interim order in such a suit. The Supreme court in that case was considering the effect of order of temporary injunction made by the court against a party. The Supreme Court has observed that if an order of temporary injunction is disobeyed by the party against whom it is directed, then two consequences generally follow if that order is breached. First is that the party who has disobeyed the order can be punished for having disobeyed the order of the court and the second consequence is that the person who has breached the order is not entitled to be heard by the court, unless he has purged himself of contempt. The Supreme Court has held because of the provisions of Section 9A of the CPC, an interim order made by the Court does not become a non-est order, even after the court holds that it has no jurisdiction to entertain the suit, because

Section 9A specially confers powers on the court to make an ad-interim order even where objection to its jurisdiction is raised. Perusal of paragraph 28 of the judgment of the Supreme Court in Tayabbhai's case shows that the Supreme Court has noted the distinction between the case where an interim order is made to which Section 9A applies and a case where Section 9A does not apply. The Supreme Court has held that in a case where Section 9A does not apply, once the court holds that it has no jurisdiction entertain the suit, the order ceases to exist and the order comes to an end on the court holding that it has no jurisdiction to entertain the suit. The Supreme Court in this case has not considered the question as to whether in a case where Section 9A does not apply and an interim order is made and the court ultimately finds that it had no jurisdiction to make the order, the order would cease to apply from the date of the Court holding that it had no jurisdiction to make the order or the order will cease to exist from the date on which it was made. Though that question has not been considered by the Supreme Court in its judgment in Tayabbhai's case, it has been considered by the Supreme Court in other cases. The Supreme Court in its judgment in the case

of Harshad Chimanlal Modi v/s. DLF Universal Ltd. and anr., (2005) 7 SCC 791 has referred to the law **laid down by the Supreme Court on this question in its judgment in paragraphs 30, 31, 32 and 33. They read as under:-**

> **30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any**

limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.

31. In Halsbury's Laws of England, (4th Edn.) Reissue, Vol.10, para 317, it is stated:

317. Consent and waiver.- Where, by reason of any limitation imposed by a statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction it a condition which goes to the root of the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject-matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an

appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a court may contain provisions enabling the parties to extent the jurisdiction by consent."

32. In Bahrein Petroleum Co., this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing." A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a

court without jurisdiction is a coram non judice.

33. In Kiran Singh v. Chaman Paswan this Court declared; (SCR p.121)

"It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction.... strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

. It can be taken as a settled law that an order made by a court having no jurisdiction is non est and its invalidity can be set up in any proceedings, where that order is sought to be enforced as foundation of right. In the present case, the Respondent is relying on the order dated 13-3-2000 made by this court to assert the right to get a

declaration because of that order that the final award made in breach of that order is unenforceable. Therefore, the Petitioner was entitled to claim in those proceedings that the order dated 13-3-2000 is a nullity because this court had no jurisdiction to make the order.

12A. The Supreme Court in its judgment in the case of Nawabkhan Abbaskhan v/s. State of Gujarat, AIR 1974 SC 1471, has considered the question as to the point of time from which the declaration made by the court that the order is a nullity operates and the Supreme Court has held that once an order is found to be a nullity that finding operates from the date that order which is found to be null and void was made. The relevant observations are to be found in paragraph 20 of that judgment. They reads as under:-

> 20. We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the

> statute clothing the administrative tribunal with power conditions it, with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent Court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e. the impugned act or order was never valid. The French Jurists call it L'inexistence or outlawed order (p.127 Brown and Garner, French Administrative Law) and could not found the ground for a prosecution. On this limited ratio the appellant is entitled to an acquittal. We allow his appeal.

. Thus, it can be taken as a settled position of law that an order made by a court having no jurisdiction is a nullity. Such an order which is non-est need not be challenged directly. It can be challenged in any proceedings wherever it is sought to be enforced as a foundation for a right in colateral proceedings. Once the Court declares the order to be nullity, the declaration relates back to the date on which that

order was made and it will be deemed that the order never existed in law.

. Thus, as I find that the order dated 13-3-2000 was a nullity in the eye of law, I have to proceed as if that order never existed, and as that order had no existence in law, there is no question of the final award made ignoring that order either being a nullity or being contrary to the public policy of India. Therefore, I do not find any substance in the challenge raised to the enforcibility of the award on the basis of the interim order dated 13-3-2000 passed by this Court.

13. The next challenge to the award on merits is that enforcement of the award will be contrary to the prevalent Foreign Exchange Laws. It is submitted that the Respondent had invoked the arbitration clause under ECAAP. In the same arbitration proceedings the Petitioner filed a counter claim, which has been awarded by the arbitral tribunal in favour of the Petitioner. So far as ECAAP is concerned, it has not been approved by the Reserve Bank of India. It is submitted that making of

payment under a contract which has not been approved by the RBI is contrary to the provisions of the Foreign Exchange Regulations Act and therefore, it is opposed to the public policy of India.

. In reply it is submitted that the submissions of the Respondent is incorrect and misconceived as it ignores the provisions of Section 47 of FERA 1973. The Petitioner relies on the observations of the Supreme Court in paragraphs 81 to 83 of its judgment in the case of Renusagar Power Co. Ltd. v/s. General Electric Co., AIR 1994 SC 860. It is submitted that the Respondent has claimed that permission is required under Section 9 of the FERA, which is not obtained by the Petitioner. According to the Petitioner, under Section 9 of FERA no permission is required for entering into a contract. Permission is required only for making payment. Thus, a contract which has the provisions for making payment, if entered into without obtaining permission under Section 9 would be valid, only before making payment under that contract permission will be required to be obtained. It is further submitted that the permission that is contemplated by Section 9 of FERA is not a prior permission. Therefore, even

ex-post-facto permission can also be obtained. In any event, it is submitted that because the award is made in an arbitration which was under ECAAP, which has not received the permission of RBI, the award cannot be faulted. At the most, at the time of execution if the Petitioner has not obtained permission of RBI by then the Respondent may be able to resist payment without the Petitioner obtaining the permission of the Reserve Bank of India. In my opinion, the objection raised on behalf of the Respondent is entirely covered by the judgment of the Supreme Court in the case of Renusagar, against the Respondent. The observations of the Supreme Court from paragraphs 81 to 83 of that judgment are relevant. They read as under:-

> 81. As regards the second submission of Shri Venugopal that the enforcement of the Arbitral Award would constitute violation to Section 9(1) of FERA which imposes prohibition to make any payment to or for the credit of any person resident outside India except in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by

the Reserve Bank. The submission is that in view of the earlier order of the Government of India dated August 1, 1969 refusing to approve rescheduling of payments the bar of Section 9 will operate and no order for enforcement of the award can be made. The High Court in this regard has placed reliance on the provisions of Section 47(3) of FERA which provides as follows:-

"Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term would be due, whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to

other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition."

82. In M/s.Dhanrajaspal Gobindram v. Shamji Kalidas and Co. (1961) 3 SCR 1020; (AIR 1961 SC 1285), this court has construed the provisions of Section 21 of the Foreign Exchange Regulation Act, 1947. Sub-section (3) of Section 21 of the said Act was more or

less similar to Section 47(3) of FERA. This Court has held:

"Sub-section (3) allows legal proceedings to be brought to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc. except to the extent permitted by the Reserve Bank.

The effect of these provisions is to prevent the very thing which is claimed here, namely, that the Foreign Exchange Regulation Act arms persons against performance of their contracts by setting up the shield of illegality. An implied term is engrafted upon the contract of parties by the second part of sub-sec (2) and by sub-sec. (3) the responsibility of obtaining the permission of the Reserve Bank before enforcing judgment, decree or order of Court, is transferred to the decree-holder. The section is perfectly plain, though perhaps it might have been worded better for which a model existed in England (p.1031) (of SCR): (at p.1290 of AIR)."

> 83. To the same effect is the law laid down by the House of Lords in England in Contract and Trading Co.Ltd. v. Barbey, 1960 AC 244 wherein the following observations from the judgment of Somerwell LJ. in Cummings v. London Bullion Company Ltd. (1952) 1 KB 327, have been quoted with approval:
>
> "The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the Rules to which I have referred. The defendant assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into Court. The Act is not to be used to enable the Defendant to retain the money in his pocket but to control its reaching its destination, namely, the plaintiff" (p.253).

It is clear from the above quoted paragraphs of the judgment of the Supreme Court that an award cannot be set aside because at the time of entering into the

contract, permission of the Reserve Bank of India was not obtained. If such a permission is necessary, it can be obtained by the party concerned before he receives actual payment. The contention, therefore, has no force and is, therefore, rejected. I have not been pointed out any law which prevents the arbitral tribunal from making an award for payment of money to a foreigner pursuant to a contract, which has not been approved by the R.B.I. In the absence of any such provision, no fault can be found with the award on this count.

14. It is next submitted on behalf of the Respondent that the terms of reference which were duly signed by the arbitrators and the parties state that the jurisdiction of the tribunal results only from Article 12.4.2 of the ECAAP. The Respondent had invoked the arbitration clause in the ECAAP. The arbitration clause under the ECAAP was rightly invoked by the Respondent because the Respondent wanted to enforce the obligations under the ECAAP against the Petitioner. The counter claims, however, submitted by the Petitioner pursuant to which the award has been made against the Respondent were in relation to making of payment by the Respondent to

the Petitioner. The payment obligations under the ECAAP were novated by the parties. The payment obligations of the Respondent arose out of the ECA, which was entered into by the parties specifically for the purpose of making payment by the Respondent to the Petitioner. ECA had also arbitration clause, but the arbitration clause was not invoked either by the Petitioner or by the Respondent. As the parties had entered into a fresh agreement, ECA, in relation to the payment part only. The terms of ECAAP relating to payment were not in force and therefore, the award made by the arbitral tribunal for payment of money is beyond the terms of reference.

. In reply the Petitioner submits that under Section 48 of the Act a person against whom the award is made cannot challenge the validity of the award on the ground that the arbitral tribunal had no jurisdiction to make the award. It is submitted that a domestic award can be challenged on the ground that the arbitral tribunal had no jurisdiction to make the award because of the provisions of Section 16 of the Act. A provision similar to Section 16 is not to be found in Part II of the Act which deals with foreign award, and therefore, under Section 48 a foreign

award cannot be challenged on the ground that the arbitral tribunal had no jurisdiction to make the award. It is submitted that no contention about lack of jurisdiction in the arbitrator to entertain the counter claim made by the Petitioner was ever raised by the Respondent before the arbitral tribunal and therefore, they cannot be permitted to raise the question which is essentially a question of fact for the first time before this court. It is further submitted that the ECA was only a summary of four agreements. It is further submitted before the arbitral tribunal parties had proceeded on the basis of ECAAP. According to the Petitioner, the conduct of the parties demonstrates that they always acted under the ECAAP, even in respect of payment obligations. The Petitioner relies on several circumstances in support of its case that the parties at all times were acting in such a manner which shows that ECAAP to be an agreement in force including in relation to the obligation for making payment. It is submitted that entering into ECA had not the result of novating or substituting ECAAP. It is submitted that ECA is dated 28th April, 1995, though ECAAP was dated 30-1-1995, was brought in effect on 15th December, 1995. Thus, ECAAP is a later agreement

than ECA, and therefore, it cannot be said that the payment obligations under ECAP were novated by entering into the ECA. It is further submitted that the question whether ECA substituted ECAAP in relation to payment obligations is a pure question of fact. It was not raised admittedly before the arbitral tribunal and therefore it cannot be permitted to be raised for the first time in this petition.

. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that under section 48(c) one of the grounds on which a foreign award can be challenged is that the award deals with the differences not contemplated by or not filing within the terms of the submissions to the arbitration. So far as the submissions to the arbitration are concerned, perusal of the terms of reference before the arbitral tribunal shows that counter claims made by the Petitioner were part of the terms of reference. Therefore, they were within the terms of submissions to arbitration. Therefore, it cannot be said that the enforcement of the award can be denied by the court on the ground that the award deals with differences not contemplated by the

terms of submissions to arbitration.

. Perusal of the provisions of Section 48 shows the ground that the arbitral tribunal had no jurisdiction to make the award is not one of the grounds on which under sub-section 1 of Section 48, the court can decline to enforce a foreign award. Section 34 also does not have a provision empowering the court to set aside a domestic award on the ground that the arbitral tribunal has no jurisdiction to make the award. But under Section 34, the court can set aside a domestic award on the ground that the arbitral tribunal has no jurisdiction to make the award, because of the provisions of Section 16 of the Act, particularly sub-section 6 of Section 16 of the Act. There is no provision similar to Section 16 to be found in part II of the Act and therefore under Section 48 a foreign award cannot be challenged successfully on the ground that the arbitral tribunal had no jurisdiction to make the award. Admittedly, the ground that the arbitral tribunal had no jurisdiction to entertain the counter claims because the counter claims arise out of ECA and not ECAAP was not raised before the arbitral tribunal. The foundation of the objection that is raised before the

court for the first time by the Respondent is that payment obligation of the Respondent under ECAAP were substituted by ECA and therefore an award for making of payment against the Respondent can be made only in an arbitration where arbitration clause under ECA is invoked. For establishing this, it would be necessary for the Respondent first to establish following facts:

(a) payment obligations under ECAAP were novated to ECA;

(b) that the parties acted upon ECA;

(c) that in so far as payment obligations are concerned, after ECA was entered into parties abandoned ECAAP.

. Now, these are essentially questions of fact and therefore, it is only the arbitral tribunal who can go into it and record a finding. In my opinion, the court will not be justified in inquiring into these questions of fact for the first time in a petition filed under Section 47. In any case, the Petitioner is relying on several circumstances to indicate that

the parties were acting only on ECAAP and not ECA. An inquiry into that aspect would be an inquiry into fact, in my opinion, such an inquiry cannot be undertaken for the first time by this Court in a petition filed under Section 47. I also find some substance in the submission made on behalf of the Petitioner that in order that the obligations under ECAAP can be said to be substituted by ECA, ECAAP should be an agreement which is entered into prior in point of time. But ECAAP though entered into earlier was brought into force on 15th December, 1995 and the ECA was entered into on 28th April, 1995. Therefore, from this point of view, ECAAP will be a later agreement and therefore, without further inquiry it cannot be said that the payment obligations under the ECAAP were substituted by ECA. For these reasons, therefore, I do not find any substance in the contentions urged on behalf of the Respondent that the enforcement of the award should be refused for this reason.

15. The last ground on which the award is challenged is that the arbitral tribunal has awarded an amount of Swiss Fr.1,453,316 to the Petitioner as loss suffered by Enco with interest. This award is

outside the scope of submissions to arbitration and is against the public policy of India, as it amounts to unjust enrichment by the Petitioner. It is submitted that there is no averment or material produced on record (i) that Enco suffered any loss; (ii) under which agreement they could claim that loss against the Respondent; (iii) that the Petitioner had paid or obliged to pay Enco any amount; (iv) that the Petitioner had an obligation to indemnify the Enco.

. It is submitted that at the time of recording terms of reference, the Respondent was asked to consider joining of Enco as party to the arbitration. The Respondent refused. Thus, Enco was not party to the arbitration. It is submitted that even assuming that Enco had suffered any loss, no averment was made nor any evidence was adduced by the Petitioner as to what was the extent of the loss and that the amount of loss was paid by the Petitioner to Enco. It is submitted that if what is enforced by the award is liability by the Respondent to indemnify the Petitioner against any loss suffered by the Petitioner, then according to Indian Law, unless there is proof that the Petitioner has suffered loss,

question of indemnification does not arise. According to the Respondent, therefore, the award to the extent that awards amount as loss to indemnify the Petitioner for the loss suffered by Enco is opposed to the public policy of India and therefore, is liable to be set aside.

. In reply, it is submitted that the Petitioner's obligations under the ECAAP were subcontracted by the Petitioner to Enco. That contract was entered into with the knowledge of the Respondent. It is submitted that because of breach committed by the Respondent, Enco who was the subcontractor of the Petitioner suffered loss and therefore the arbitral tribunal was justified in making the award in favour of the Petitioner to compensate the Enco for the loss suffered by it. It is submitted that the agreement entered on 5th May, 1995 was a tri-parted agreement between the Enco, the Petitioner and the Respondent. It is submitted that under Clause 10(2) of ECAAP the Respondent had agreed to indemnify the Petitioner for their loss. The Petitioner relies on a judgment of this Court in the case of Khadarpar Amarnath vs. Madhukar Pictures and submits that in equity the person entitled to the indemnity may enforce his

right as soon as his liability to the third party has arisen and he may obtain relief before he has actually suffered loss. Lastly, it is submitted on behalf of the Petitioner that if this court holds that the arbitral tribunal was not justified in awarding the amount to make good the loss suffered by Enco, that part of the award is severable and therefore, the court may refuse to enforce the award to that extent only.

. The Respondent has basically challenged the award so far as this aspect of the matter is concerned on the ground that the award is contrary to the public policy of India. According to the Petitioner, though Enco was not a party to the arbitration proceeding, the loss suffered by it was recoverable by it from the Petitioner. Under the ECAAP, the Respondent was under an obligation to indemnify the Petitioner for any loss suffered by the Petitioner. It is an admitted position that there is no material on record to show that Enco, in fact, suffered any loss, that Enco has initiated any proceedings for recovering any amount of loss from the Petitioner. The Enco was also not a party to the arbitration. So far as the obligation of a person who is to indemnify the other

is concerned, the Supreme Court in its judgment in the case of State Bank of Saurashtra vs. Ashit Shipping (2002) 4 SCC 736, has clearly held that in cases of indemnity the question of making good loss arises only when there is a proof that loss is suffered. So far as the judgment relied on by the Petitioner of this Court is concerned, in that judgment also the court has observed:

> "At law an action on the contract of indemnity normally does not lie until the promise has been actually indemnified by paying the third party's claim. The right to indemnify, however, may arise under a special contract, on the true construction of which the right may be enforced, even at law, before actual loss has been sustained.
>
> But in equity, the rules of which now prevail in all Courts, even in the absence of such a special agreement, the person entitled to the indemnity may enforce his right as soon as his liability to the third party has arisen and therefore he may obtain relief before he has

> actually suffered loss.
>
> He may, therefore, in an appropriate case obtain an order compelling the promise to set aside a fund out of which the liability may be met, or to pay the amount due directly to the third party, or even when the promissory is under no liability to the third party, as is the case in contracts of mere indemnity to the promise himself.
>
> In all other cases it may be open to the indemnity-holder to ask for a decree for the amount in question in his own favour.

. It is, thus, clear that unless in law there is a contract of indemnity, there is no question of asking any payment from the person who is under an obligation to indemnify unless, actually payment is made, even in equity there can be a decree in favour of the person, he can only ask for a fund to be set up. Therefore, even if the law laid down by the judgment relied on by the Petitioner is taken to be the correct law, the arbitral tribunal could not have

made an award in favour of the Petitioner for the loss which is supposed to have been suffered by Enco in the absence of any proof that Enco has actually suffered that loss and that Enco has claimed that amount from the Petitioner. It is to be noted that substantive law applicable to the arbitral proceedings was the law enforceable in India. The award made by the arbitral tribunal directing payment to the Petitioner of the amount of Swiss Fr.1,453,316 is contrary to the law prevailing on indemnity in India. Therefore, the award can be said to be contrary to the public policy of India. The Petitioner itself has stated that part of the award by which the arbitral tribunal directs payment of Swiss Fr.1,453,316 is severable and therefore the court may refuse to enforce that part of the award.

16. In the result, therefore, it is held that the foreign award at Exh.A & B are enforceable, save and except that part of the award at Exh.A which directs payment of Swiss Fr.1,453,316 by the Respondent to the Petitioner.

17. Petition is thus granted in terms of prayer clauses (a) & (b) subject to the exception as

indicated above. Petition is also granted in terms of prayer clause (c). The Respondent is given six weeks time to file affidavit. Put up after six weeks.

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